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IN THE

Supreme Court of the United States

NO. 967 OCTOBER TERM, 1970

EMMETT TERHAR, NICHOLAS J. HAYDOCK AND JOHN D. JILLSON, TRUSTEES OF THE ANTHRACITE HEALTH AND WELFARE FUND, Petitioners,

and

CHARLES REED, DOMINIC IERO, MAX DYWOSKI AND ANTHONY GANLY, MEMBERS OF THE PENSIONED ANTHRACITE COAL MINERS PROTEST EXECUTIVE COMMITTEE, SUING ON BEHALF OF THEMSELVES AND ALL OTHER MEMBERS OF THE CLASS OF PENSIONED ANTHRACITE COAL MINERS AND WIDOWS OF DECEASED PENSIONED ANTHRACITE COAL MINERS, Respondents

vs.

HONEYBROOK MINES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

NO. 967 OCTOBER TERM, 1970

EMMETT THOMAS, NICHOLAS J. HAYDOCK AND JOHN D. JULIAN, Trustees of the Anthracite Health and Welfare Fund,

Petitioners,

and

CHARLES NERO, DOMINIC IERO, MAX DYNOSKI and ANTHONY GANLY, Members of the Pensioned Anthracite Coal Miners Protest Executive Committee, Suing on Behalf of Themselves and all Other Members of the Class of Pensioned Anthracite Coal Miners and Widows of Deceased Pensioned Anthracite Coal Miners,

Respondents

vs.

HONEYBROOK MINES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED.

1. Does any special and important reason exist for the granting of a writ of certiorari where the Court of Appeals has held that equity permits the award of counsel

fees to the beneficiaries of a Taft-Hartley Pension Fund, where they have conferred a benefit on the entire class of beneficiaries by compelling the Trustees of the Fund, who for many years permitted huge delinquencies in employer contributions to exist and deliberately failed to take effective legal action to collect them, to institute and diligently to prosecute legal actions for the recovery of such employer delinquencies?

2. Should equity permit the Trustees of a Taft-Hartley Pension Fund, who have been guilty of misconduct in the performance of their fiduciary duties, to assert, as a reason for denying counsel fees to beneficiaries who have compelled the Trustees to perform their duty, that these beneficiaries have also pointed out to the Trustees that their conduct has violated the criminal provisions of the Act?

STATEMENT.

The instant action was commenced on May 18, 1964. The original plaintiffs were Emmett Thomas, Mart F. Brennan and Harry J. Connolly, who were at that time the Trustees of the Anthracite Health and Welfare Fund. The Fund is a pension trust established by the collective bargaining agreement between the United Mine Workers of America and the Anthracite Coal Operators.

The Trustees alleged in their complaint that the defendant, Honeybrook Mines, Inc. had failed to pay royalties to the Fund as required by the collective bargaining agreement, which it had signed on November 23, 1959 and, in the period from November, 1959 to February, 1964, had become delinquent in an amount in excess of $132,727.00. Jurisdiction was based on Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. Section 185.

On September 2, 1965, respondents, representing themselves and all other pensioned anthracite coal miners and widows of deceased pensioned anthracite coal miners, filed

a motion to intervene. The motion was granted, over the opposition of the Trustees, on December 21, 1965.

Judgment in the amount of $963,254.71 was entered against the employer on April 11, 1968 pursuant to a stipulation of counsel. Intervenors, respondents herein, filed a motion for the allowance of their counsel fees, which was also opposed by the Trustees, and their motion was denied by order of the court entered January 31, 1969.

The respondent pensioned miners then appealed to the United States Court of Appeals for the Third Circuit. The Court there held that equity permitted the award of counsel fees on the record presented. On petition for rehearing by the Trustees, the Court of Appeals amended its judgment to permit the district court, upon remand, to hold an evidentiary hearing on the fee application and to decide, on the record thus expanded, and in the light of the legal principles announced by the Court of Appeals, whether or not such application should be granted.

The Anthracite Health and Welfare Fund was initially established by the Anthracite Wage Agreement of 1946. This Agreement, and its successor Agreements, provided for the payment of royalties to the Fund on each ton of anthracite coal produced for sale or use by the operating coal companies. The Agreement of February 1, 1959 set the royalty at seventy cents ($.70) per ton. (A. 14a)

The amount of the pension paid to each pensioned anthracite miner was originally one hundred dollars per month. This amount was reduced first to fifty dollars and then, in November, 1961, to thirty dollars per month. (A. 86a)

The widespread and vocal discontent in the coal regions among the pensioned anthracite miners produced by these successive reductions resulted in the formation of a committee named the Pensioned Anthracite Coal Miners Protest Executive Committee. In 1961 and 1962 members of the Committee met with Thomas Kennedy, who was concurrently Chairman of the Trustees of the Fund and

International President of the United Mine Workers of America, and with Mart F. Brennan, who was concurrently a Trustee of the Fund and President of District 7, United Mine Workers of America. Kennedy and Brennan informed the members of the Committee that the successive pension reductions were necessitated by the failure of coal operators to remain current in their royalty payments, but assured the Committee that efforts would be made to collect such delinquencies. (A. 33a, 34a, 86a, 87a)

The members of the Committee, respondents herein, repeatedly demanded that the names of delinquent coal operators and the amounts of delinquencies be divulged. The demand for this information was repeated by counsel for respondents, James S. Palermo, Esquire, of Hazleton and William Bruno, Esquire, of Philadelphia, who were retained by the Committee in August, 1962. Kennedy and Brennan at all times refused to divulge this information. (A. 34a, 88a)

Emmett Thomas, Executive Assistant to International President Thomas Kennedy, was appointed by the Union to replace Kennedy as Chairman of the Trustees of the Fund on February 13, 1963. Brennan, President of District 7, United Mine Workers of America, remained on the Board of Trustees as the neutral Trustee required by Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. Section 186. (A. 20a, 21a)

Detailed investigation and examination of public records on file with agencies of the Federal and state governments and courts indicated that delinquencies totaling millions of dollars had been permitted to exist by the Trustees, and that even where the Trustees had commenced actions against delinquent coal operators in the state courts during 1954 and 1958, they had failed to prosecute such actions to judgment.

This investigation revealed the following facts, as set forth in the affidavit of Charles Nedd dated October 14, 1965, and either specifically admitted or not denied, in the

answering affidavit of Trustee Brennan dated November 8, 1965, in accordance with the numbered paragraphs of those affidavits (A. 22a-36a; 37a-61a):

4. That the Mammoth Coal Company was continuously delinquent from March, 1949 until November, 1963, and that such delinquencies totaled $656,321.56, and that, other than filing a complaint in state court in 1954, the Trustees failed by legal processes to enforce the payment of these delinquencies or to compel Mammoth Coal Company to remain current in its payments.

5. That Indian Head Coal Company was continuously delinquent in its royalty payments commencing in December, 1948, that it was still delinquent in the amount of $195,792.63 in November, 1965, and that, other than the filing of a complaint in state court in 1954, the Trustees had failed by legal processes to enforce the payment of these delinquencies or to compel the Company to remain current in its payments.

6. That the Harry E. Coal Company was continuously delinquent from December, 1948 until February, 1965, that such delinquency totaled $709,645.96, and that, other than filing a complaint in state court in 1954, the Trustees had failed by legal processes to enforce the payment of these delinquencies or to compel the Company to remain current in its payments.

7. That the Number 9 Coal Company was continuously delinquent commencing in December, 1948, that it paid no royalties at all in 1949 and 1950, that the cumulative delinquencies in November, 1954 when the Trustees finally filed their complaint in state court was $717,847.70, that judgment was entered in this amount plus $146,578.55 interest against Number 9 Coal Company for failure to plead, and that not one cent of this judgment was ever collected by the Trustees.

8. That Hydrotated Anthracite Fuel Company, Inc. had been continuously delinquent commencing in February,

1949, that no royalties at all were paid in the period between January, 1953 and November, 1954 when the Trustees finally filed their complaint, that the accumulated delinquency as of November, 1954 was $148,140.80, that judgment was finally entered against Hydrotated for failure to file an answer in January, 1957 and that of the amount of this judgment, plus interest, only $42,747.33 has ever been recovered by the Trustees.

9. That Kohinoor Coal Company was continuously delinquent commencing in 1949, that the delinquency totaled $43,417.40 in November, 1954 when the Trustees finally filed their complaint, that the delinquency had increased to $54,417.70 by April of 1955 and that, as of August, 1955, when the Company ceased operations, a delinquency in an unrevealed amount existed which has never been fully collected by the Trustees.

10. That Gilberton Coal Company became delinquent in October, 1951, that by November, 1954, when the Trustees finally filed their complaint, the delinquency totaled $297,613.30, that by November, 1955 the delinquency had increased to $493,289.80, that by September, 1962 a delinquency of $276,049.21 existed, that Gilberton was still delinquent in November, 1965 in the amount of $135,061.40, and that other than the filing of a complaint in state court in 1954, the Trustees failed by legal processes to enforce the payment of delinquencies or to force the Company to remain current in its payments.

11. That the St. Clair Coal Company became delinquent in its royalties in August, 1948, that for the following two years, until September, 1950, no royalties at all were paid, that by November, 1954, when the Trustees finally filed their complaint in state court, the cumulative delinquency totaled $880,864.62, that the Trustees have recovered only $45,000.00 of this delinquency, and that the Trustees failed by legal processes to compel the payment

of the delinquency or to force the Company to remain current in its payments.

12. That the Mary D. Mining Company became delinquent in its royalties in January, 1950, and by November, 1954, when the Trustees finally filed their complaint, the delinquency totaled $116,043.70, that only $70,610.30 of this delinquency has ever been recovered, that the Company ceased operations in 1957, and that Trustee Brennan inquired of two of the partners in the Company and was informed by them that no assets existed to pay the balance of the delinquency.

16. That the Coates Coal Company ceased operations in the latter part of 1961, that said company was delinquent in the amount of $74,373.87, that the Trustees took no legal action to collect the delinquency until April, 1964, and then requested a continuance of the action so that they could devote their attention to active operating companies, and that the delinquency has not been collected and no further legal action taken by the Trustees.

19. That in 1958 an action was commenced by summons in the state court against the Capone Coal Company by the Trustees to recover $11,851.70 in delinquent royalties, but no further action was taken by the Trustees because they literally forgot about this action.

21. That the Penag Coal Company produced 166,323 tons of anthracite in 1962, but only paid the Fund $5,400.00 in royalties, that in November, 1965, this Company's royalty delinquency was still quite substantial, that the Trustees had made no substantial progress toward a solution, and that the Trustees still had not instituted any legal action against the Company to compel it to pay its delinquency or to remain current in its payments.

Respondent pensioned miners, thereupon, instituted an action on March 11, 1963 against the United Mine

Workers of America in the United States District Court for the Eastern District of Pennsylvania. Jurisdiction was based on diversity of citizenship and damages in excess of 10 million dollars were sought in favor of the Fund. On December 11, 1963 the Union's motion to dismiss for lack of diversity was granted and the Court of Appeals affirmed in a decision reported at 332 F.2d 373. (A. 88a)

On May 18, 1964 the instant action against Honeybrook Mines, Inc. was commenced by the Trustees seeking delinquent royalties back to November, 1959.

On December 9, 1964 the Trustees commenced a second action for delinquent royalties. The defendant in that case was Northwest Mining Co.

After the dismissal of respondents' initial action was affirmed, and a petition for rehearing denied, respondents on January 21, 1965 filed substantially the same cause of action against the United Mine Workers of America in the Middle District of Pennsylvania, basing jurisdiction on Section 301(a) of the Labor Management Relations Act of 1947. The defendant Union's motion to dismiss this complaint was denied, renewed, and denied again. Thereafter, the Union was granted a certificate permitting an interlocutory appeal and the Court of Appeals, in an opinion filed August 9, 1968 and reported at 400 F.2d 103, held that the pensioned miners, plaintiffs in that action, had incorrectly asserted jurisdiction and remanded to the district court with leave to file an amended complaint.[1] (A. 89a, 90a)

After respondent pensioned miners reinstituted their action against the Union in January, 1965, the Trustees instituted numerous actions against delinquent coal operators. Approximately thirty-five such actions have to date been instituted by the Trustees. All of these actions by the Trustees were commenced after the pensioned miners

[1] An amended complaint was filed on January 23, 1969.

brought their action against the Union in March of 1963, and all but the instant case, Honeybrook Mines, Inc., and one other were commenced after the pensioned miners brought their second action in the Middle District in January, 1965. (A. 90a)

The pensioned miners moved to intervene in the instant action against Honeybrook Mines, Inc. and, subsequently, identical motions to intervene were filed in the other cases. All such motions to intervene were granted. Since their intervention, the pensioned miners, by their counsel, have participated in all phases of the litigation against the delinquent coal operators, have cooperated with and assisted, to the best of their ability, the Trustees and their counsel, and have closely monitored the progress of litigation in all these actions to ensure their diligent prosecution, in contrast to the 1954 and 1958 actions. (A. 91a)

Eleven of these actions against delinquent coal operators, including the instant action against Honeybrook Mines, Inc., have resulted in the payment of $818,982.05 to the Fund, obligations to pay admitted delinquencies in the amount of $914,047.62, and judgments in the amount of $990,526.29. The pensioned miners, who for the most part exist in the most straitened circumstances, moved in each of these eleven actions for the allowance of their counsel fees from the funds so created by settlement or judgment. On January 31, 1969 the district court entered an order denying the allowance of counsel fees, and a timely notice of appeal was filed in each case. By agreement of counsel, however, only the appeal in the instant case was docketed in the Court of Appeals.

ARGUMENT.

The Trustees contend that their petition for a writ of certiorari should be granted because the decision of the Court of Appeals is contrary to precedent, federal labor

policy, and the interests of beneficiaries of Taft-Hartley Pension Funds.

None of these contentions by the Trustees is supportable. There is ample precedent for the award of counsel fees where, as here, the beneficiaries of a trust fund act to benefit the entire class of beneficiaries by compelling the Trustees to perform their fiduciary duties properly.

Federal labor policy, which favors the existence and proper management of Taft-Hartley Pension Trusts, is advanced, not hindered, by permitting the award of counsel fees to pensioned beneficiaries who compel miscreant Trustees to perform their duties properly. So also, the beneficiaries, who have a direct interest in the proper management of such pension trusts, are benefited, not harmed, by actions which compel such proper management.

Nowhere do the Trustees in their petition set forth any special and important reason for the granting of the writ. The respondent pensioned miners submit that, under the circumstances of this case, no such special and important reason exists.

I. The Court of Appeals was correct in holding that equity permits the award of counsel fees to the beneficiaries of a Taft-Hartley Pension Fund where these beneficiaries have protected the interest of the entire class of beneficiaries by compelling the Trustees, who for many years neglected their duty to collect employer contributions, to institute and diligently to prosecute legal actions for the recovery of such delinquent contributions.

It cannot be questioned that counsel fees are properly awardable to a litigant who has traced or created a common fund for the benefit of others as well as himself. This rule, articulated by the Sapreme Court in *Trustees* v. *Greenough*, 105 U.S. 527 (1881), is an exception to the general rule that counsel fees are not ordinarily recoverable in the absence of a statute or enforceable contract.

Fleischmann Distilling Corp. v. *Maier Brewing Co.*, 386 U.S. 714 (1967); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939).

The *Greenough* doctrine is just as vigorous today as when it was first announced by the Supreme Court. *Powell* v. *Pennsylvania Railroad Company*, 267 F.2d 241 (3d Cir. 1959).

Greenough and its progeny are based on a rationale of fundamental fairness. Where others have been benefited by a litigant's efforts, the failure to charge the common fund for attorney's fees results in unjust enrichment of those benefited.

There can be no question that all the beneficiaries of the Fund have been benefited by the efforts and persistence of respondents and their counsel. The long history of neglect by the Trustees commencing in 1946, the huge delinquencies permitted to exist year after year, the shrinking pension payments to the beneficiaries of the Fund, the entire dismal record of nonpayment by the coal operators and inaction by the Trustees, until respondents compelled them to perform their fiduciary duty, stands in stark contrast to the more than thirty-five actions instituted by the Trustees under compulsion since 1964.

The rule applicable to the facts of the instant case is clearly set forth in *Powell* v. *Pennsylvania Railroad Company*, 267 F.2d 241 (3d Cir. 1959). In *Powell*, the individual plaintiffs, members of a labor union, brought a class action in 1956 against their union and their employer to compel enforcement of a wage award which had been made in 1949 by the National Adjustment Board as a result of proceedings initiated by the union. Prior to institution of the class action in 1956, the union had not taken any substantial action to enforce the award. Subsequent to the filing of the class action in 1956, the union pursued active settlement negotiations with the employer, which resulted in a settlement requiring the employer to pay $300,000.

From the foregoing, it is obvious that there is a complete factual identity between *Powell* and the instant proceedings. As in *Powell*, the United Mine Workers of America in this case created a contractual right in favor of certain beneficiaries, i.e., a collective bargaining agreement. Secondly, as in *Powell*, neither the union officials nor the Trustees of the Fund, the persons responsible for enforcement of the contractual obligation, took effective action to enforce it for many years. Thirdly, as in *Powell*, counsel for the class of beneficiaries instituted proceedings to compel the union to take such action. Fourthly, as in *Powell*, as a result of the proceedings instituted by counsel for the class, those who had responsibility to enforce the contractual obligation finally took action which resulted in a recovery.

In *Powell*, the court held that counsel for the class was entitled to have reasonable counsel fees paid from the settlement even though the settlement finally resulted from proceedings between the union and the employer. In so holding, the court stated:

> "Using comparable factors and considering all the facts, we think it clear that appellants' vigorous initiative for plaintiffs and subsequent suit breathed new life into a dormant and inert award, brought about a reality instead of a promise and thus created a fund." (at p. 245)

The Trustees contend that respondents cannot recover their counsel fees because they were intervenors in this action, that it was the Trustees who filed the complaint against the defendant Honeybrook Mines, Inc., and the other delinquent operators, and thus created the fund.

But the formality of who signed the complaint cannot erase the efforts and persistence of respondents and their counsel, nor can it change the fact that the recovery of delinquent royalties was nonetheless a benefit to the Fund and all its beneficiaries.

Moreover, this Court has emphatically rejected the idea that an award of counsel fees should depend on the formalities of the litigation. In *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), it was argued that an award of counsel fees would be improper because the plaintiff therein had not sued as a representative of a class nor directly established a fund in which others could participate. The Court answered this contention thus (at 166-67):

> "That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discretion. Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility. In the actual exercise of the power to award costs 'as between solicitor and client'

> all sorts of practical distinctions have been taken in distributing the costs of the burden of the litigation. And so, the circumstances under which the petitioner enforced the fiduciary obligation of the Ticonic Bank—the relation of its vindication to beneficiaries similarly situated but not actually before the court, as well as the interest of the common creditors where the funds of the bank are not sufficient to pay them in full, and doubtless other considerations—must enter into the ultimate judgment of the District Court as to the fairness of making an award, or the extent of such award, 'as between solicitor and client' in this case."

The Court of Appeals held that the district court had taken an overly narrow view of its equitable power and, in denying the Trustees' petition for rehearing, amended its judgment to permit an evidentiary hearing before the district court so that it could determine whether fundamental fairness, under all the circumstances of the case, required the allowance of counsel fees. This holding by the Court of Appeals is entirely consistent with the equitable spirit of the *Greenough* doctrine and certainly presents no special and important reason for the granting of a writ of certiorari by this Court.

II. The Trustees of a Taft-Hartley Pension Fund should not, in equity, be permitted to assert their own violations of the criminal provisions of the Taft-Hartley Act as a reason for denying counsel fees to beneficiaries of the Fund who compelled them to perform their fiduciary duty and warned them regarding their misconduct under the Act.

The Trustees have contended that respondents should be denied counsel fees because respondents have accused the Trustees and the United Mine Workers of America of conduct violative of Section 302 of the Labor Management

Relations Act of 1947, 29 U.S.C. Section 186. This misconduct, the Trustees assert, precludes the collection of royalties from coal operators and the further distribution of pensions to the Fund beneficiaries. "Thus, while alleging that they have rendered a compensable service for the benefit of the Fund, the intervenors have joined the employers in an attempt to emasculate it." (Petition, p. 11)

Respondents are pensioned anthracite coal miners. They have spent many years of their lives in black holes in the ground, befouling their lungs with coal dust and risking their lives in this dangerous work, in order to earn the right to receive a pension. When the Trustees failed in their fiduciary duty to collect royalties, respondents acted to compel the Trustees to perform their duties properly.

There was no other course available to respondents. Their pleas, requests for information and demands for action, addressed to the Trustees and the Union, were rebuffed or ignored. The Trustees persisted in their breaches of fiduciary duty until respondents compelled them to act properly.

The Trustees' fiduciary duty to collect royalties due and owing to the Fund, and their misconduct in failing to perform this duty, is entirely distinct from the Trustees' misconduct in permitting themselves to be dominated and controlled by the Union in violation of Section 302.

When this action was instituted in 1964, and when respondents instituted their actions to compel the collection of delinquent royalties, first in the Eastern District of Pennsylvania in 1963 and later in the Middle District in 1965, two of the three Trustees of the Fund were officials of the United Mine Workers of America. Since Section 302(c)(5)(B) requires that employees and employers be equally represented in the administration of the Fund, this unequal representation constituted a violation of the Act.

Despite the fact that this violation was pointed out to the Trustees by respondents, no action was taken by the Trustees to correct the situation until after Judge Nealon, in an opinion filed in a related case on December 30, 1966, pointedly noted (at 345): "The composition of the Board of Trustees certainly raises questions and invites inquiries . . . ."[2]

Assuming that the resignation of Brennan cured this violation of the Act, there is no reason why royalties cannot now be collected and pension payments made. *Moglia* v. *Geoghegan*, 403 F.2d 110 (2d Cir. 1968), cert. denied 394 U.S. 919 (1969), upon which the Trustees rely for the proposition that respondents have attempted to emasculate the Fund, holds only that the widow of an employee of a non-union employer, which had never signed a collective bargaining agreement or any other agreement providing for contributions, as required by Section 302, could not receive a pension. In *Moglia*, the violation could have been cured by the execution of such an agreement by the employer, but the employer at all times refused. *Moglia*, therefore, does not preclude the collection of royalties and the payment of pensions by Trustees who are not then acting in violation of Section 302.

It is absurd, therefore, to suggest that respondents have attempted to emasculate the Fund. Respondents have corrected the Trustees' breach of fiduciary duty by compelling them to institute this, and related, actions for the collection of delinquent royalties. If, despite the protests of respondents, the Trustees have nonetheless persisted in their violation of Section 302, it is for the Trustees to correct this situation by immediately ceasing their misconduct.

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[2] *Emmett Thomas, Mart F. Brennan, and John D. Jillson, Trustees of the Anthracite Health and Welfare Fund* v. *Reading Anthracite Company*, 264 F.Supp. 339 (M.D.Pa. 1966). Mart Brennan, President of District 7, United Mine Workers of America, resigned as neutral Trustee on January 5, 1967, six days after Judge Nealon's opinion was filed.

The Trustees complain that respondents failed to bring an action to restrain the Trustees' violation of Section 302. It is, to say the least, unclear as to how this failure resulted in prejudice to the Trustees. Respondents clearly and repeatedly warned the Trustees that their conduct in permitting Union domination of their activities constituted a violation of Section 302. Incorporating this warning in the form of a complaint seeking an injunction would not have rendered the warning any more clear or explicit.

The *Greenough* doctrine, as noted earlier, is an equitable doctrine founded on a concept of fundamental fairness. Respondents properly acted to compel the Trustees to perform their fiduciary duties and, at the same time, warned the Trustees that their conduct violated Section 302. If the Trustees, heedless of that warning, have persisted in their violation of Section 302, equity should not permit them to assert their own misconduct as a reason for denying respondents the counsel fees to which they are entitled.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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